Thus the 1910 Amendment will have no bearing on this point in these States and the trustee will continue unable to divest the bankrupt's wife of her dower right. To line up Pennsylvania with these States and thereby make uniform the application of the Bankruptcy Act, *in re Chotiner* must be upheld by the Supreme Court of the United States. Clearly the General intent of the Amendments of 1910, as seen by the debates of Congress [22] and their interpretation by the courts,[23] was to deal with the question of conditional sale, *supra*. There is nothing tending to prove that it was to affect the dower right of the bankrupt's wife. Whether that right shall be protected in Pennsylvania depends upon the local law of that State. It is submitted that it is better to carry out the intent of Congress and at the same time retain the common law principle of dower than, merely because of a technical similarity of words, to extend the exceptions which have long existed in the law of Pennsylvania and include the trustee in bankruptcy in that class of persons which is permitted to divest a wife of her traditional dower right.

H. I.

CARRIERS—DISCRIMINATION—As to whether or not the common law provided against discrimination by carriers, there is great diversity of opinion. It would seem that no such rule existed in England.[1] Although there is a decided conflict with respect to this question in the United States, the weight of authority upholds the view that all shippers similarly situated were entitled to equal rates.[2] Legislation in both countries has removed all room for doubt concerning the law to be applied today.[3]

Since today carriers must charge the same rate for substantially the same transportation service at the same time and under substantially similar circumstances, the question arises as to what recovery may be had by a shipper against whom a carrier has discriminated. A recent opinion of the Supreme Court of Minnesota is to the effect that damages are to be measured by the difference between the rate paid by the plaintiff and the lower rate enjoyed by

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S. C., Tenn., Va., and Wis.

[22] Congressional Record, 61st Congress, pp. 2552-4.

[23] *Supra*, n. 14.

[1] Great Western Ry. Co. v. Sutton, L. R. 4 H. L. 238 (1869); Baxendale v. Eastern Counties Ry. Co., 4 C. B. (N. S.) 63 (1858).

[2] Messenger v. P. R. R., 36 N. J. L. 407 (1873); Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 145 U. S. 276 (1891). But see *contra*, Johnson v. Pensacola Ry. Co., 16 Fla. 623 (1878), where it is said that the carrier's only duty was to allow reasonable rates.

[3] English Railways Clauses Consolidation Act, §90, 8 & 9 Vict., c. 20 (1845), and Interstate Commerce Act, §2. Almost all of the separate states have enacted similar provisions to apply to interstate commerce.

the favored shipper.[4] In so holding this court refused to follow the Supreme Court of the United States in the case of *Pennsylvania Railroad* v. *International Coal Mining Company*,[5] where this rule of damages was strictly repudiated.

The plaintiffs in both of these cases had paid the schedule rates for shipments of freight while other shippers engaged in similar business had been allowed rebates by the railroads. The United States court admitted that there was a good cause of action against the railroad for unjust discrimination, but held that nominal damages only could be recovered because the plaintiff had proved no substantial damage. In other words, substantial recovery would be allowed only as compensation for injury received and injury consisted only of loss in business due to being undersold in market by another shipper who was enabled to do this because of the lower rate allowed him. Mr. Justice Lamar, speaking for the court, said in part, "Having paid only the lawful rate, plaintiff was not overcharged. . . . There was no proof of injury—no proof of decrease in business, loss of profits, expense incurred or damage of any sort suffered."

The Minnesota court, on the other hand, after discussing this case and declining to follow it, affirmed that their previous convictions were only strengthened by passages in the opinions upon which this decision was based.[6] The rule laid down in the Minnesota case was that the disfavored shipper has a right of action for damages, at least to the extent of the discrimination.[7] This was also the opinion of Mr. Justice Pitney who voiced a vigorous dissent from his colleagues on the United States Supreme Court.[8]

There are many arguments on both sides of the question as to whether the law provides a substantial recovery for unjust discrimination when the claim is founded merely upon the fact that the carrier has allowed a lower rate to one of the plaintiff's competitors. In considering the matter of damages, the first thought that suggests itself is that one who is compelled to pay more to have his goods transported than another who is competing with him, is damaged to the extent of the difference between these two rates. It seems to be a strange theory which can be worked out along the line that he who is allowed transportation for the lower figure is being

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[4] Seaman v. Minneapolis & R. R. Ry. Co., 149 N. W. Rep. 134 (Minn. 1914).

[5] 230 U. S. 184 (1912).

[6] Texas, *etc.*, R. R. Co. v. Interstate Commerce Commission, 162 U. S. 233 (1895), where it was said, "Nor is there any legal injustice in one person procuring a particular service cheaper than another"; and Parsons v. Chicago, *etc.*, R. R. Co., 167 U. S. 447 (1896), in which the court held that one who is charged a reasonable rate has no right to complain because another is given a lower rate.

[7] See opinion in 121 Minn. 488.

[8] 230 U. S. 208-247.

benefited, but no injury is being inflicted upon him who must pay the higher. Under this doctrine recovery may be had only when the goods of the separate shippers come into direct market competition, as in this case alone is it possible to prove damages resulting from the discrimination.

The problem to be solved is whether the legislation which has been passed to regulate this matter and avoid unjust discrimination, was meant to apply purely in cases where consequential damages result, or whether it was not intended to strike at the root of the evil and compel the carrier to charge equal rates to all shippers similarly situated, providing substantial recovery to the amount of the difference if any such shipper were charged more than another. Going back to the Act of Parliament,[9] upon which the Interstate Commerce Act and most of our statutes have been based, we find the cases divided under it upholding the latter view.[10] Inasmuch as these decisions had been rendered previous to the enactment of our legislation on this subject, Mr. Justice Pitney points out that Congress must have had in mind that the same conclusions would be reached under the Interstate Commerce Act.[11] The majority opinion in that case is based upon the fact that a clause expressly allowing the measure of damages to be the difference in rate was struck out of the act before adoption. It appears, however, that this was done in order to provide generally in one clause[12] for damages recoverable for breach of any provision of the act.

An argument has been allowed that if a shipper who has paid no more than the legalized tariff rate is allowed to recover the difference between this and a lower rate enjoyed by a favored shipper, this would amount to the authorization of a second illegal act on the part of the railroad which must charge the regular tariff rate. This contention, however, should bear but little weight. The railroad occupies a position of economic advantage with respect to the shipper, and the law must interfere to protect the latter. Unless a published tariff is considered as sacred, there is no reason to hold that a carrier who has already departed therefrom in one instance should not be compelled to treat all competing shippers alike. It hardly seems logical to say that if one shipper is charged more than others, he may recover the difference provided he paid more than the tariff rate, but not so if he paid exactly the rate prescribed by the tariff. The carrier is guilty of discrimination in the one case as well as the other, and the shipper paying the higher rate is equally injured in both cases.

J. N. E.

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[9] Railways Clauses Consolidation Act, *supra.*

[10] Great Western Ry. Co. v. Sutton, *supra;* London, *etc.*, Ry. Co. v. Evershed, L. R. 3 App. Cas. 1029 (1878); Denaby Main Colliery Co. v. Manchester, *etc.*, Ry. Co., L. R. 11 App. Cas. 97 (1885).

[11] 230 U. S., at page 237.

[12] §8.